



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 627 OF 2019

DANIEL NGANGA KAMAU.....APPELLANT

VERSUS

CATHERINE MUTHONI MBUTHIA (Personal Representative

of the estate of FRANCIS NJIRU NJAGI).....RESPONDENT

RULING

1. The application dated 25th September, 2019 and the application dated 15th October, 2019 were heard simultaneously. This ruling is therefore in respect of both applications.
2. The application dated 25th September, 2019 was filed by the Appellant. It principally seeks orders **that the honourable court grant leave to the Appellant/Applicant to file an Appeal.**
3. Secondly, **that pending the hearing and determination of the intended Appeal, an order do issue setting aside and/or discharging the warrants of arrest issued on the 25th September, 2019 in CMCC 2339 of 2012 – Daniel Ng’ang’a Kamau v Catherine Muthoni Mbuthia (Personal Representative of the Estate of Francis Njiru Njagi).**
4. The Applicant is aggrieved by the orders made by the lower court for issuance of a warrant of arrest for committal to civil jail for contempt of court. The Applicant has impugned the said orders and exhibited a draft Memorandum of Appeal. It is stated that the Applicant stands to suffer substantial loss if the orders sought are not granted. It is further averred that the application has been filed without unreasonable delay.
5. The application is opposed. It is stated in the replying affidavit that the application lacks merits, has been brought with unclean hands and that there is concealment of material facts. The Respondent gave the genesis of the dispute as a lease agreement over plot No. P 1055, Ruai and accused the Appellant of harassment and interference with quiet possession and occupation of the property. That the Appellant has attempted to illegally effect eviction from the said property over non-existent rent arrears and levying distress for rent which resulted in the filing of Tribunal Case No.90 of 2010 Nairobi and CMCC No. 2339/12 Nairobi.
6. That despite the orders of maintenance of the *status quo* made by the lower court, the Appellant disconnected the electricity supply to the premises and the Appellant also filed another suit being CM’s Misc. Appl. Nairobi 998/2019 seeking orders for distress for rent. That the lower court granted orders for the restoration of electricity power in No. CMCC 2339/12 Nbi. That the said orders were not complied with by the Appellant, hence the contempt of court and warrant of arrest orders.
7. In a rejoinder, the Appellant filed a supplementary affidavit and stated that the issues raised by the Respondent are still active and pending in the lower court. It is contended that there is no lease in existence between the parties as the same which was for 10 years expired and that the Respondent is now a trespasser in the property. That there was a further breach of the lease agreement due to subletting of the premises by the Respondent and building of permanent structures and non- payment of rent with arrear of Ksh.1,011,430/= at the time of the expiry of the lease plus the *mesne* profits and therefore the Appellant has a right to distress for rent.
8. The Appellant contended that the power supply was restored to the premises and that the orders issued by the lower court for warrant of arrest were unfortunate and unfounded and urged the court to set aside the said orders.
9. The application dated 15th October, 2019 seeks the following orders:

“1. Spent.

2. Spent.

3. That this honourable court be pleased to grant the Proposed Appellant leave to appeal out of time against the Order of Honourable D.O. Mbeja (Mr.) SRM given on 16th September, 2019 in Nairobi CMCC No.2339 of 2012, Daniel Ng'ang'a Kamau v Francis Njiru Njagi.

4. That this honourable court be pleased to extend time to file and serve the Memorandum of Appeal against the Order of Honourable D.O. Mbeja (Mr.) SRM given on 16th September, 2019 in Nairobi CMCC No.2339 of 2012, Daniel Ng'ang'a Kamau v Francis Njiru Njagi.

5. That the annexed draft Memorandum of Appeal be deemed to have been duly filed on payment of the requisite fees.

6. That pending the hearing and determination of the Appeal, this honourable court be pleased to stay further proceedings in Nairobi CMCC No.2339 of 2012, Daniel Ng'ang'a Kamau v Francis Njiru Njagi.

7. That costs of this application be provided for.

10. It is stated in the supporting affidavit of Catherine Muthoni Mbuthia that in CMCC Nbi 2337/12 the Landlord was allowed to withdraw a replying affidavit filed in response to her application which replying affidavit she had already responded to by way of a further affidavit and also filed written submissions. It is contended that the withdrawal of the affidavit in breach of the rules of procedure was tantamount to re-opening the case a fresh, hence the intended Appeal. The delay in filing the Appeal is explained as due to inadvertence due to being held up in the proceedings before the lower court.

11. In a replying affidavit filed in opposition to the application. It is stated that the lower court exercised its discretion in allowing the withdrawal of the earlier replying affidavit and allowing the filing of another replying affidavit in response to the Amended Notice of Motion. That the said Amended Notice of Motion is not the subject of the intended Appeal. That there is no prejudice to be suffered as the tenant has the opportunity to file a supplementary affidavit in response to the replying affidavit. That the matters raised herein are yet to be determined by the lower court and the impugned order has not been exhibited herein.

12. With the concurrence of the parties, the two applications were to be canvassed contemporaneously by way of written submissions. The Appellant's side filed theirs. The Respondent did not file any. I have considered the applications, the responses thereof and the submissions filed.

13. The Appellant has complained of having not been given the opportunity to be heard in the lower court and also states that he complied with the lower court orders and restored electricity to the premises. The matter is still active before the lower court. It has not been demonstrated why the Applicant has not appeared before the lower court to explain his position there and see the determination of the lower court first.

14. On the tenancy dispute, the matters raised are also still active before the lower court. This court has also not been shown any current lease agreement or any evidence of payment of rent.

15. The issue regarding which affidavit ought to remain on record in the matter before the lower court relates to an application before the lower court which application is yet to be determined by the lower court. It would be a matter of conjecture and micro management of the trial court for this court to make any determinations regarding the affidavit evidence that is before the lower court.

16. With the foregoing, this court finds no merits in either of the applications herein. Consequently, I dismiss the two applications. Each party to bear our costs.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B.THURANIRA JADEN

JUDGE